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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954

No. 150

W. A. SHIELDS,
Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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To the United States Court of Appeals for the Fifth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on March 17, 1955.

OPINIONS BELOW.

The judgment of the District Court (R. 297-298) is unreported. The opinion of the Circuit Court of Appeals (R. 345-354) is reported in 220 F. 2d 242.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 17, 1955 (R. 345). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED.

Are railroads relieved of the obligation imposed by 45 U. S. C., Section 11 to keep a designated appliance "secure" by reason of the fact that the Interstate Commerce Commission has not adopted a regulation standardizing and making uniform such an appliance.

STATUTES INVOLVED.

The pertinent statutory provisions (45 U. S. C., Sections 11 and 12) are printed in Appendix A and B.

STATEMENT.

On May 6, 1952, petitioner, an independent contractor, was instructed by the consignee of a tank car of gasoline to unload the tank car which had been placed on a siding in the freight yards of Atlantic Coast Line Railroad Company in Montgomery, Alabama (R. 24, 25, 117, 118, 130, 131). The car, SHPX 21336, like most tank cars, was to be unloaded from the bottom of the car (R. 129), but in order for the gasoline to flow out it is necesary for the dome cap on the top of the car to be removed and a valve inside the dome opened (R. 130). Petitioner climbed to the top of the car to take off the dome cap and open the valve. He stepped on the running board which runs along the side of the tank near the top thereof. It broke and caused him to fall to the tracks below (R. 132), inflicting painful and permanent injury to the vertebrae in his back. It is without dispute that the running board was not secure since it broke when petitioner stood on it, and was knotty, cracked and so rotten and crumbly that it could be mashed in one's hand.

As last amended the complaint stated a cause in two counts against Atlantic Coast Line Railroad Company as delivering carrier and Southern Railway Company as

originating carrier. A verdict was directed for Southern, which action was affirmed on appeal; Southern does not enter into the question presented by this petition and no further reference will be made to it.

One of the counts against Atlantic was based on a violation of the Safety Appliance Act in failing to maintain a "secure running board" as required by the Act (45 U. S. C., Section 11). The other count against Atlantic was based on negligence. During the trial the defective board was referred to as a running board, top running board, dome step board, short running board, and dome running board. In its opinion the Court of Appeals referred to it as a "dome step board", a title urged by Atlantic almost as an afterthought, for at the trial it was called a "running board" by witnesses for both sides who were experienced railroad men (R. 180, 194, 259). In Atlantic's answers to interrogatories its superintendent referred to it seven times as a "running board" (R. 24-30). Atlantic's repair records on the defective car called it a "running board" (Plaintiff's Exhibit 7). Counsel for Atlantic referred to it as such at the trial (R. 259, 260). The running board is used in loading and unloading the tank (R. 219), a fact which is common knowledge in the railroad business (R. 248). At times the running board is used by the train crew (R. 179).

The Trial Court charged the jury that the running board in question was covered by the Safety Appliance Act and that it was for the jury to determine whether the running board was secure (R. 274, 276, 277, 284). The Trial Court also charged the jury on the law as to the negligence count (R. 278). The jury returned a general verdict for petitioner against Atlantic for $7,500 (R. 297).

It was Atlantic's theory throughout the trial and on appeal that the defective running board was not a safety appliance because the Interstate Commerce Commission

standardization regulations relating to tank cars (Sections 131.8 and 131.9, Title 49, Code of Federal Regulations) did not cover this running board.

Atlantic appealed and the Circuit Court of Appeals reversed. On appeal the Court adopted as the basis of its decision the argument of Atlantic that since the ICC had not made an order standardizing the running board in question as to "number, dimension, location, and manner of application" under the authority granted it in 45 U. S. C., Section 12, the board was not a running board within the Safety Appliance Act. The Court stated:

> "By its very failure to prescribe any regulation governing such a device, the Interstate Commerce Commission has demonstrated its administrative determination that dome step boards do not fall within the scope of the Act" (R. 351).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that the Interstate Commerce Commission by promulgating a regulation standardizing the number, dimensions, location and manner of application of some running boards on tank cars has made an administrative determination that no other running board on a tank car can fall within the scope of the Safety Appliance Act.

2. In holding that once the Interstate Commerce Commission has promulgated a regulation standardizing the number, dimensions, location and manner of application of some running boards on tank cars, such regulation operates to define conclusively what is and what is not a running board on a tank car within the protection of the Safety Appliance Act.

3. In holding that the fact that the Interstate Commerce Commission has not set by regulation the number, dimen-

sion, location, and manner of application of running boards such as the one in suit, constitutes an administrative determination binding on the Courts and injured persons that such running boards were not intended by Congress to be covered by the Safety Appliance Act.

4. In reversing the District Court.

REASONS FOR GRANTING THE WRIT.

1. This case involves the safety and rights of railroad employees and those members of the general public who in the course of their daily activities must work on and around railroad equipment. Congress, by the Safety Appliance Act, has imposed a rule of absolute liability on railroads for the protection of those injured as the proximate result of named appliances that are defective. Congress has declared that sill steps, hand brakes, running board ladders and grab irons are of such importance to persons using them that a failure to maintain them in a safe condition subjects a railroad to absolute civil liability in case of injury or a statutory fine even if there is no injury.

In addition to the Congressional declaration that such appliances be maintained in a safe condition, the Act vests in the ICC the authority to standardize and make uniform such appliances. Certain railroad cars have appliances named in the Act which have not been standarized under ICC regulations. Petitioner in this case was injured as a proximate result of such a defective appliance.

This Court has many times declared the Congressional intent expressed in the Safety Appliance Act to be to protect users of the appliances named therein. It is of vital importance that there be a determination of whether the protection of the Act against unsafe appliances is limited by the exercise of the ICC of its rule-making power under Section 12.

at all, there were errors in the charge and in the refusal of its requested instructions which require a reversal.[2]

We fnid ourselves in complete agreement with the position taken and the reasons given for that position in the appellant's brief with respect to the first count. This is that when a railroad company has complied with the regulations prescribed by the Interstate Commerce Commission, pursuant to the authority delegated to it in 45 U.S.C.A., Sec. 11, et seq., it "* * *has discharged its full duty so far as the ladder (or any other safety device) requirement of the Safety Appliances Act is concerned. The judgment of the trial court and jury cannot be submitted for that of the Commission." *A.T.& S.F. RR. Co. vs. Scarlet,* 300 U.S., 471; *Apache Ry. v. Shumway,* 158 Pac(2) 142.

We agree with the appellant that the dome step is not, within the classification of the I.C.C., a running board, and that, in assuming, without any basis in law for the assumption, that it was a safety appliance, the court erred. He did correctly declare in his charge: that whether it was or was not a safety appliance was to be determined as matter of law; and that he did not and would not consider the testimony of any of the witnesses as to whether it was or was not. Without, however, any basis in the statute or in any order or regulation of the Commission for so holding, he did determine as matter of law that it was a safety appliance. So determining, he advised the jury that it was not for it to determine whether it was or was not such,

2.- Since the error will not again occur, in view of the fact that the safety appliance count has been eliminated, it is sufficient at this time to say that in charging the issues raised by the two counts, the court did not follow the admonition of the Supreme Court in the O'Donnell case to keep the issues of the two counts completely separate a distinct. On more than one occasion he charged in a way which made it extremely difficult if not impossible for the jury to avoid confusion, if not bewilderment, in respect to the completely different concepts of absolute liability under count on, if th step was unsafe, and conditional liability under the second count, only if its unsafety was the result of negligence.

Further, while the district judge, in the general charge, did endeavor to correctly present the defense which defendants put forward in their special charges numbered 9 to 13, nclusive, we are of the opinion that he did so skimpingly, if at all; and that this failure should be remedied on another trial.

The problem exists today, as shown by the present case. It will constantly recur because as railroad cars are redesigned and changed by the railroad industry resulting changes in appliances on such cars will not at once be reflected in ICC regulations. The effect of the decision of the Court of Appeals is to limit the protection of the class of persons sought to be protected by the Act to the extent to which the ICC has promulgated regulations. Those whom Congress intended to protect should not be given so tenuous a margin of safety.

2. The Court below decided that because the ICC in its regulations covering tank cars (Sections 131.8 and 131.9 Title 49, Code of Federal Regulations) did not promulgate any regulations governing the running board in question, the running board could not be a safety appliance within the scope of the Safety Appliance Act. The Court decided in effect that Congress in granting the ICC under Section 12 of the Act authority to standardize by regulation the number, dimensions, location and manner of application of appliances also vested in the ICC exclusive authority to determine which safety appliances should be within the protection of the Act. Such a construction is clearly contrary to the congressional intent and pre-empts any field of operation for Section 11 of the Act.

Section 11 (Appendix A) provides in part that "all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards . . ." Section 12 of the Act (Appendix B) gives the ICC authority to fix by regulation "The number, dimensions, location, and manner of application of the appliances provided by Sections 4 and 11 of this title . . ." The Court below decided that even though Congress in Section 11 declared that all running boards must be secure, an insecure running board was not within the Act if it had not been standarized by the ICC under the standardization authority conferred by Section 12.

but only whether it was safe, and thus imposed upon the defendant, as to the dome step, the absolute obligation imposed by the statute only with respect to safety appliances. In doing this, he erred.

As appellant correctly points out in the discussion in its brief, a chaotic condition would be produced if the question of compliance with the Safety Appliances Act and the specifications governing the number, location, dimension and manner of appliances should be left to the varying notions of judges or the inexperienced laymen who comprise petit juries. For it is not every device with which a car might b equipped which comes under, and is governed by, the Safety Appliances Act or the regulations adopted by the Interstate Commerce Commission pursuant thereto. Only those are safety appliances which are officially determined by law or regulation to be such. *Central Vermont Roalroad v. Perry,* 10 F(2) 132; *Fleming v. Richardson,* 24 NW(2) 280; *James C. Davis v. Manry,* 266 U.S. 401; *Hill v. Minneapolis,* 200 NW 485.

Nowhere in the regulations adopted by the Interstate Commerce Commission relating to tank cars, as set forth in Secs. 131.8 and 131.9, Title 49 (Transportation) Code of Federal Regulations, or elsewhere, will there be found any reference to a dome step board, by whatever name that device might be labeled.

By its very failure to prescribe any regulation governing such a device, the Interstate Commerce Commission has demonstrated its administrative determination that dome step boards do not fall within the scope of the Act.

A verdict should have been instructed on the first count.

In view of our agreement with appellant that the step

The Court below stated:

> "For it is not every device with which a car might be equipped which comes under, and is governed by the Safety Appliance Act or the regulations adopted by the Interstate Commerce Commission pursuant thereto. Only those are safety appliances which are officially determined by law or regulation to be such."

This statement is correct but where the law itself states that a running board is a safety appliance the Congressional declaration of running boards as safety appliances cannot be affected by either action or lack of action on the part of the ICC.

There is a clear field of operation for both Sections 11 and 12. Section 11 declares a congressionally fixed standard for ladders and running boards, i. e. "secure." Section 12 declares that where the ICC has standardized as to "number, dimension, location and manner of application" a running board or ladder which is "secure" might nevertheless violate the Act if it is not in compliance with the standardization regulation.

Under Section 12 the ICC has the power to change the standards fixed by its orders. If the ICC were to adopt an order setting out that tank cars should be equipped with a running board near the dome of the car to be so many feet long, fastened to the car in a certain manner, located so many inches from the top of the dome, etc., under the decision below the board would be a running board within the Safety Appliance Act only from the effective date of the order. If the ICC were to so act this year, under the decision below the appliance itself would be brought under the Act 44 years after Sections 11 and 12 were passed by Congress. The true interpretation of these sections is that for 44 years the standard of safety of any running board has been that it be "secure"; and that if the ICC ever issues a standardization regulation the rail-

is not a safety appliance, it is unnecessary for us to consider and decide whether defendant is right in its second position, that plaintiff, not benig a railroad worker, is not entitled to the protection of the Act. It is sufficient to refer to cases pro and con. *Patton v. Baltimore,* 197 Fed. 732; *Reisberg v. Duluth,* 47 NW(2) 113; *Fairport v. Meredith,* 292 U.S. 598; *Brady v. Terminal,* 303 U.S. 10; *Jacob v. Ill.,* 63 So. 306.

As to the second count, we agree with Atlantic's view that if the defect in the board was not discoverable in the exercise of reasonable care, it could not, as delivering carrier, be held negligent for not discovering the undiscoverable.

We cannot agree with it, though, that the evidence established as matter of law that, in the exercise of due care, the defect was undiscoverable. On the contrary, we think there was sufficient evidence to take the second count to the jury.

Because, however, of the submission of the two counts for a general verdict,[a] and because of the errors in the giving and refusal of charges, the judgment may not be affirmed as to Atlantic on the second count.

As to plaintiff's appeal from the judgment for Southern Railway, Southern meets it first with a motion to dismiss because the appeal was not timely. The point made is that, instead of being taken within the time limited from the entry of the judgment in Southern's favor, it was not taken until after the motion of Atlantic for a judgment notwithstanding the verdict and, in the alternative, for a new trial, had been acted upon.

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[a] The court charged the jury: "You must determine, Gentlemen, whether the plaintiff is entitled to recover under either theory of this complaint. It is not necessary, however, if you find that the plaintiff is entitled to recover under either theory of this case."

roads then would have the additional duty of seeing that all running boards described therein meet the mechanical specifications of uniformity set out by the regulation. Obviously, the ICC by its regulations can neither add to nor subtract from the appliances to be included under the Act since Congress has already enumerated these appliances. The ICC has authority only to standardize and make uniform within the limits of Section 11; any item enumerated in Section 11 which has not been included in a standardization regulation still must be "secure."

Many requirements embraced by the term "secure" are not within the ICC regulations, for the ICC rule-making power goes only to "number, dimension, location and manner of application." If the ICC regulation as to running boards provided that each must be of "sound lumber and 2½ inches thick" there would be a question of whether this was within its rule-making power; but that question is not reached, for the regulations as to running boards do not mention the type or quality of material to be used in them, leaving that to be governed by the requirement of law that each running board be "secure."

The purpose of the rule-making power given ICC is to assure that on all cars the designated appliances are uniform and standard, so that employees moving about, often at night, can move with assurance. **Illinois Central Railroad Company v. Williams**, 242 U. S. 462.

As the evidence disclosed (R. 181), the running boards below the domes of tank cars have not been standardized, varying on different types of tank cars as to dimension, location, etc., but the effect of the decision below is that since these particular running boards have not been standardized by regulation they need not be secure as required by the Safety Appliance Act.

3. The decision below is in conflict with the decision of this Court in **Illinois Central Railroad Company v. Wil-**

Without laboring the matter by a discussion of them, it is sufficient to say that, under the cases cited by appellant, *Continental v. U.S.*, 167 F(2) 107, a case from this court of *Zimmern v. U.S.*, 298 U.S. 167, and the case of *Leishman v. Associated*, 318 U.S. 203, the point is not well taken. The appeal was timely. It may not be dismissed.

On the merits, however, we agree with Southern: that, under the undisputed facts, Southern was not the alter ego of the N.O. and N.E. Railway Company; that it was not, and could not be, sued as the original carrier; and that the district judge was right in instructing a verdict in its favor.

No useful purpose will be served by setting out in detail the evidence on which this conclusion is based. It suffices to say that while Southern, as the holding company, has the same general executive officers as its subsidiary, the other employees are not the same. The Southern Railway, as such, does not run or operate the N.O. & N.E. Railway Company, and it had nothing to do with the handling of the car in question, as originating carrier or otherwise. A consideration of the cases on which appellant relies for his different view shows that they do not, as applied to the facts of this case, at all support it. This is particualrly so with respect to the case on which he mainly relies, *Southern Railway v. Crosley*, 201 F(2) 873, in which the facts were wholly different.

Without setting out the facts of this case, it is sufficient to say that to hold under them that the Southern Railway Company may be sued as the operator of the N. O. and N.E. Railroad Company, and, therefore, the originating carrier, would require a holding in substance that a holding company is responsible simply, because it is a holding company, as the actor in the routine, the ordinary, activities of its wholly owned subsidiary in and about the business which

liams, 242 U. S. 462. In the **Williams** case the railroad argued that the requirement of Section 11 that grab irons be secure was suspended by an order of the ICC postponing the effective date of its regulations standardizing the number, dimensions, location and manner of application of grab irons. The railroad in the **Williams** case argued substantially what was held below, i. e., that Section 11 was so absorbed by Section 12 as to grant the ICC exclusive authority not only to standardize and make uniform safety appliances but also to designate which appliances are safety appliances and to fix by its orders the time when appliances are to become safety appliances. This Court in the **Williams** case rejected this contention and held that the absolute duty of maintaining as secure the Congressionally enumerated appliances was not affected by standardization orders of the ICC.

The reliance by the Circuit Court of Appeals on **Atchison, Topeka and Santa Fe Railroad Company v. Scarlett,** 300 U. S. 471, serves to add emphasis to the conflict with **Williams;** in the **Scarlett** case this Court specifically pointed out that the ladder in question was both "secure" as required by Section 11 and "standard" as required by the ICC regulations.

The holding below that a railroad is relieved of maintaining a running board as "secure" as required by 45 U. S. C., Section 11, because of the absence of an ICC regulation standardizing such a running board is in conflict with the **Williams** opinion.

Obviously, the judgment of the trial court and jury cannot be substituted for that of the ICC, as stated in the **Scarlett** case and relied on by the Circuit Court of Appeals. But the judgment of the Commission does not go to what is "secure", and outside the ICC's field of operation the court and jury must determine if the congressional mandate has been followed.

the subsidiary was incorporated to, and does, actively own and operate.

The judgment is AFFIRMED as to the Southern Railway Company. It is REVERSED and REMANDED as to the Atlantic Coast Line for further and not inconsistent proceedings.

4. The decision of the Court below is believed to be in conflict with the decision of the Ninth Circuit Court of Appeals in **Southern Pacific Company v. Carson**, 169 F. 2d 734. In the **Carson** case the plaintiff was injured when he was riding a "cut" of railroad cars. He was using a brake club to wind the staff brake in order to stop the cars and the brake club broke. The staff brake complied with ICC standardization regulations. The regulations made no mention of brake clubs just as the regulations in this case do not mention the particular running board which broke under petitioner.

The railroad argued that since the handbrake on the tank car conformed to the specifications set forth in the ICC regulations there could be no violation of the Safety Appliance Act. That is exactly what Atlantic argued and the Court below decided as to the running boards (i. e., that since it has complied with standardization requirements for bottom running boards there can be no violation of the Act by another and insecure running board on the car).

The Court held otherwise, stating:

> "We disagree. The Act (Sec. 11) in absolute and imperative terms requires that all cars 'be equipped with efficient handbrakes'. There can be no doubt that by this language Congress meant to require the installation of brakes acting or having the power to act effectually. Such is the meaning of ordinarily ascribed to the word 'efficient'. The Legislative mandate was not superceded or rendered nugatory by the Commission's order. Its virility, we think, remains unimpaired. No language which would support a contrary view is to be found in the statute."

In the Carson case, although the brake met the mechanical specifications of the Commission, nevertheless, the railroad was held liable under the Safety Appliance Act for

an inefficient brake because of the addition to the brake system of a defective brake club. In the present case the bottom running board of the tank car met the mechanical requirements of the Commission (or, at least, there is no evidence that it did not), but the railroad should be liable under the Safety Appliance Act for the addition of a defective top or dome running board to the system of running boards on the tank car.

Perhaps the theory of the Court of Appeals below was that once an ICC regulation sets the number, dimensions, location and manner of application of certain running boards those standardized running boards, and no others, need be "secure." Certainly it was not the Congressional purpose that regulations designed to create standard appliances for the safety of the worker operate to leave the worker at the mercy of unsafe appliances of the nature and character designated by the statute but not included in the regulations. The Congressional purpose is to protect the worker from an insecure running board, not merely from an insecure running board made uniform by the ICC. Assume that the ICC uniformity regulations require two ladders on a box car, located at certain points, attached in a certain manner, etc. but the railroad attaches two more ladders which are regularly used by employees and others for the purposes for which ladders on box cars are intended. Certainly employees do not use the two additional ladders at their peril.

Petitioner submits that the holding of the Ninth Circuit in the **Carson** case is the correct interpretation of Section 11 of the Act and the conflict with **Carson** arising from the opinion of the Court below should be resolved in petitioner's favor.

5. The decision below is believed to be in conflict with the decision of the Fourth Circuit Court of Appeals in **Davis v. Reynolds**, 280 F. 363, cert. den. 258 U. S. 627. The

Davis case involved sill steps which under section 11 of the Act are required to be "secure." The sill steps in question were worn and slick and this condition proximately caused the plaintiff's injuries. The railroad contended that it had discharged its duty under the Safety Appliance Act with respect to sill steps when it had securely fastened a step of the materials and dimensions required by the ICC. In short, the railroad in the **Davis** case argued that if it had complied with the ICC regulations it had complied with the requirements of the Safety Appliance Act. This is the position adopted by the Fifth Circuit in its decision below in the present case.

In the **Davis** case, however, the Fourth Circuit rejected this position and held that the railroad had the duty to comply with the statutory standard of "secure sill steps" as well as with mechanical standards for sill steps set by the ICC.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 11, 1955.

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APPENDIX.

A.

Title 45, United States Code, Section 11:

Safety Appliances Required for Each Car; When Hand Brakes May Be Omitted.

"It shall be unlawful for any common carrier subject to the provisions of Sections 1-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in sections 11-16 of this title, to-wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the top of such ladders; Provided, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose. Apr. 14, 1910, c. 160, 2, 36 Stat. 298."

B.

Title 45, United States Code, Section 12:

Safety Appliances, as Designated by Commission, to Be Standards of Equipment; Modification of Standard Height of Drawbars.

"The number, dimensions, location, and manner of application of the appliances provided for by sections 4 and 11 of this title as designated by the Interstate Commerce Commission shall remain as the standards

of equipment to be used on all cars subject to the provisions of sections 1-16 of this title, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown, and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of sections 11-16 of this title. Said Commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after time so fixed or the standard so prescribed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission. Apr. 14, 1910, c. 160, 3, 36 Stat. 298."

C.

Opinion Below

Before HUTCHESON, Chief Judge, HOLMES, Circuit Judge, and DAWKINS, District Judge.

HUTCHESON, Chief Judge: This is another case like *O'Donnell v. Elgin*, 338 U.S. 384, *Carter v. Atlanta*, 338 U.S. 430, and *Affolder v. New York, Chicago & St. Louis*, 339 U.S. 596, in which a claimant, for injury resulting from defects in a railroad car, invokes both the absolute liability imposed by the Safety Appliances Act, 45 U.S.C., Secs. 1 to 46, and the qualified liability arising out of negligence. In those cases it was negligence under the Federal Employers Liability Act, 45 U.S.C., Secs. 51 to 60. Here it is negligence at common law.

In those cases, particularly in the O'Donnell case, the Supreme Court points to the wide spread confusion attending the anomalous procedure employed in prosecuting such claims.[1] The same difficulties have made themsleves felt here with the result that on the appeal of the Atlantic Coast Line Railroad Company, the judgment must be reversed and the cause remanded.

The matter stands differently, however, on the appeal of plaintiff from the judgment upon a directed verdict as to the Southern Railway Company. For the reasons hereafter stated, as to it this judgment must be affirmed.

Brought against the Atlantic Coast Line Railroad Company, as the delivering, the Southern Railway Company,

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1. "Notwithstanding this court's efforts to distinguish the safety appliance violation case from the common law negligence case, confusion of the two persists, in part, at least, due to the anomalous procedure by which such claims are litigated. * * * The appliance cause often is joined with one for negligence, and even sometimes, as here, mingled in a single mongrel cause of action. In addition, at trial, certain issues such as causation and extent of injury, for example, are common to both causes of action. * * *"

"* * *Pleadings will serve the purpose and limiting the issues only if claims based on negligence are set forth sparately from those based on violation of the appliance acts.

"But no mater how the pleadings are allowed to stand, we think it is almost indispensable to an intelligible charge to the jury that a clear separation of the two kinds of actions be observed and impressed. * * *" O'Donnell v. Elgin, 338 U.S. 384.

as the originating, carrier, the suit was for damages for personal injuries received by plaintiff, an independent contractor and invitee, as the result of the breaking when he stepped upon it of a dome step on a tank car which he had been engaged to unload.

Complying with the admonition of the court in the O'Donnell case, *supra*, the complaint was in two counts. Count One charged that the dome step was a safety appliance, and that its breaking was a violation of the Appliances Act. Count Two charged that the defendants negligently furnished and tendered, for the unloading of the gasoline therein, a defective tank car.

In addition to a general denial, the Atlantic Coast Line alleged as to the first count, (1) that the dome step was not a safety appliance within the meaning of the act, and (2) that if it was, plaintiff, not being a railroad employee, was not entitled to the benefits of theact.

As to the second count, the charge of common law negligence, it alleged: that the board which gave way had been newly painted; that the defect in it was not a patent but a hidden defect, which could not have been discovered by the use of ordinary care; and that the Atlantic Coast Line, as a delivering carrier, was not as matter of law, and could not be found, guilty of negligence in handling the car.

The Southern Railway alleged: that the Alabama Statute of Limitations of One Year had barred the cause of action as to it, and (2) that it was not the originating carrier, and that it had never had the car in its possession.

On the issues thus joined, the cause was tried to a jury

on evidence which included uncontradicted evidence: that the New Orleans and Northeastern Railroad Company was the initial carrier of the car; that the Southern Railway Company had at no time had anything to do with its handling; and that, though the stock of the New Orleans the Northeastern Railroad Company was solely owned by it, Southern Railway Company was an absolutely separate corporation that it did not operate its subsidiary; and that it had never handled the car.

The district judge, therefore, instructed a verdict for the Southern Railway and submitted the cause to the jury as to the Atlantic Coast Line on both counts and on a general charge.

There followed a general verdict and judgment for $7500.00 against Atlantic Coast Line from which that defendant has appealed, while plaintiff has appealed from the judgment in favor of the Southern Railway Company.

Here the Atlantic Coast Line insists that it should have had an instructed verdict on both counts, and that the judgment must be reversed and rendered for it. As to the first count, it claims: (1) that the dome step or platform was not a safety appliance; and (2) that if it was, plaintiff may not invoke the benefit of the act. As to the second count, its claim is that the evidence establishes as matter of law: that the defect in the board was not patent but latent and that defendant had made the usual careful inspection of the car and the defect complained of was not discoverable upon such an inspection.

In the alternative, it urges upon us that if it was not entitled to an instructed verdict throughout, it was certainly entitled to an instruction as to Count One, and, finally, that if it was not entitled to an instructed verdict